

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Sterling P. Beatty,

Petitioner

v.

D. Neven, et al.,

Respondents

2:13-cv-00764-JAD-PAL

**Order Denying Petition for Writ of
Mandamus, Motions for Counsel and an
Evidentiary Hearing, and Certificate of
Appealability**

[ECF 13, 54, 55]

Nevada state prisoner Sterling P. Beatty brings this federal habeas corpus action to challenge his Nevada state-court convictions for murder, robbery, and related charges stemming from a drug deal gone awry. Beatty alleges ineffective-assistance-of-counsel claims for relief. Because Beatty has not shown that the Nevada Supreme Court's denial of his claims was contrary to, or involved an unreasonable application of, clearly established federal law, nor that it was based on an unreasonable determination of the facts in light of the evidence presented, I dismiss his remaining claims¹ for relief and deny his petition. And because Beatty has not made a substantial showing that any of his constitutional rights were denied, I decline to issue him a certificate of appealability.

Background

A jury in Nevada's Eighth Judicial District Court, Clark County, convicted Beatty of five counts: (1) murder with use of a deadly weapon, (2) conspiracy to commit robbery, (3) attempted robbery with use of a deadly weapon, (4) attempted robbery with use of a deadly weapon, and (5) attempted murder with use of a deadly weapon.² The judgment of conviction was entered on

¹ I previously dismissed Grounds 1 and 2 under *Stone v. Powell*, 428 U.S. 465 (1976). ECF 44.

² See Judgment of Conviction, Ex. 51. The exhibits referenced in this order were filed by respondents and are found in the record at ECF 24–31.

1 April 18, 2008;³ Beatty timely appealed, and the Nevada Supreme Court affirmed.⁴ In its order
 2 of affirmance, the Nevada Supreme Court stated that the evidence presented at trial, when
 3 viewed in the light most favorable to the prosecution, established the following:

4 Simms and the victim, Paul Brown, traveled to an apartment
 5 complex near the intersection of Lake Mead Boulevard and Jones
 6 Boulevard in Las Vegas to purchase marijuana from an individual
 named C-dog.

* * * *

7 After Simms and Brown parked their car, Beatty approached the vehicle,
 8 pointed a gun at Brown's stomach and said, "Give us everything you got."
 9 A moment later, Simms was attacked by an accomplice who also had a
 10 firearm. As Simms was wrestling on the ground with his attacker, he
 11 glanced over and saw Brown fighting with Beatty. A moment later, he
 12 heard a gunshot. While Simms was trying to keep his attacker from
 13 shooting him, Beatty walked over, pointed a gun at him, and pulled the
 14 trigger at least twice but nothing happened. The attackers fled. Simms
 15 called 911, and although the police arrived in about five minutes, it was
 16 too late to save Brown.

17 The autopsy showed that Brown died from a single gunshot wound
 18 to his right collarbone. Forensic experts determined that although
 19 the bullet had fragmented and the exact caliber could not be
 20 determined, the jacket was "of nominal .38 caliber," which
 21 included a range of calibers including .38 and .357. Similar
 22 ammunition was found during a search of Beatty's home. In
 23 addition, the police recovered Beatty's cell phone and a hat with a
 24 stain matching his DNA from the crime scene.⁵

25 Beatty next filed a habeas petition in Nevada state court.⁶ Following an evidentiary
 26 hearing, the state court denied the petition.⁷ Beatty appealed, and the Nevada Supreme Court
 27 again affirmed his conviction.⁸ Beatty then filed this federal habeas action, asserting 15 claims

28 ³ *Id.* The judgment of conviction was amended on March 12, 2010, to correct a clerical error
 and to correctly reflect that the sentence on Count 4 will run consecutively to the sentence on
 Count 3. *See* Amended Judgment of Conviction, Ex. 64.

⁴ *See* Order of Affirmance, Ex. 61.

⁵ *Id.* at 2–3.

⁶ *See* Petition for Writ of Habeas Corpus (Post-Conviction), Ex. 68.

⁷ *See* Findings of Fact, Conclusions of Law and Order, Ex. 82.

⁸ *See* Order of Affirmance, Ex. 83.

1 for ineffective assistance of counsel. I previously granted respondents' motion to dismiss
 2 Grounds 1 and 2 under *Stone v. Powell*⁹ and directed respondents to file an answer responding to
 3 Beatty's remaining claims.¹⁰ Respondents filed an answer,¹¹ and Beatty filed a reply.¹² Beatty
 4 also requests an evidentiary hearing¹³ and appointment of counsel.¹⁴

5 Discussion

6 A. Standard for habeas relief under 28 U.S.C. § 2254(d)

7 A federal court may not grant an application for a writ of habeas corpus on behalf of a
 8 person in state custody on any claim that was adjudicated on the merits in state court unless the
 9 state-court decision (1) was contrary to, or involved an unreasonable application of, clearly
 10 established federal law or (2) was based on an unreasonable determination of the facts in light of
 11 the evidence presented in the state-court proceeding.¹⁵ In making this determination, federal
 12 courts look to the last reasoned state-court decision.¹⁶ "Where there has been one reasoned state
 13 judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting
 14 the same claim rest upon the same ground."¹⁷ To the extent no reasoned opinion exists, courts
 15 must independently review the record to determine whether the state court clearly erred in its
 16 application of controlling federal law or whether the state court's decision was objectively

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 19 ⁹ *Stone v. Powell*, 428 U.S. 465 (1976).

20 ¹⁰ ECF 44.

21 ¹¹ ECF 51.

22 ¹² ECF 52, 53.

23 ¹³ ECF 54.

24 ¹⁴ ECF 55.

25 ¹⁵ 28 U.S.C. § 2254(d).

26 ¹⁶ *Smith v. Hedgpeth*, 706 F.3d 1099, 1102 (9th Cir. 2013), *cert. denied* 133 S.Ct. 1831 (2013).

27 ¹⁷ *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 803 (1991).

unreasonable.¹⁸

B. Ineffective Assistance of Counsel under 28 U.S.C. § 2254(d)

In *Strickland v. Washington*,¹⁹ the United States Supreme Court established a two-prong test for ineffective-assistance-of-counsel claims. A petitioner must show (1) that the defense attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant so severely that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²⁰ If a state court has adjudicated a claim of ineffective assistance of counsel, federal habeas courts ask only "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."²¹ Beatty has not met his burden for any of his remaining claims—Grounds 3–15.

Ground 3. Possession of Cell Phone

In Ground 3 of his habeas petition, Beatty claims that his trial counsel was constitutionally ineffective for failing to object to the state's claim that he was in possession of the cell phone found at the crime scene.²² The Nevada Supreme Court rejected this claim, reasoning that Beatty failed to show that there was any basis to object to the cell phone and noting that defense counsel are not required to raise a futile objection. The Nevada Supreme Court also found that Beatty failed to show prejudice. Because the cell phone was found at the

¹⁸ *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000); *see also Harrington v. Richter*, 562 U.S. 86, 98 (2011) (holding that "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.").

¹⁹ *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

²⁰ *Id.* at 694.

²¹ *Harrington*, 562 U.S. at 105; *see also Cheney v. Washington*, 614 F.3d 987, 994–95 (9th Cir. 2010) (acknowledging double deference required for state court adjudications of *Strickland* claims).

²² Petition for Writ of Habeas Corpus, ECF 13 at 8.

1 crime scene and there was evidence tying the phone to Beatty, the court reasoned that it is
2 unlikely that this objection would have been sustained or that the authenticity of the cell phone
3 would have been seriously questioned.²³

4 The Nevada Supreme Court's ruling is reasonable. There was ample evidence at trial
5 tying Beatty to the cell phone found at the crime scene, including testimony by a witness that he
6 had called Beatty hundreds of times on the phone number tied to the cell phone,²⁴ and testimony
7 that the phone number was assigned to Beatty's wife.²⁵ Beatty has not shown that there was any
8 reasonable basis for his trial counsel to object to the state's claim that he was in possession of the
9 cell phone found at the crime scene, or that there was any evidence that the phone belonged to
10 someone else that could have been offered. Therefore, Beatty is not entitled to federal habeas
11 relief on this claim.

12 **Ground 4. Motion to Dismiss Attempted Robbery Charges**

13 Beatty next claims that his trial counsel was constitutionally deficient for failing to move
14 to dismiss the attempted-robbery charges.²⁶ The Nevada Supreme Court rejected this claim,
15 reasoning that sufficient evidence was introduced at trial to support these charges. Thus, the
16 court concluded, Beatty's counsel was not deficient for failing to move to dismiss the charges,
17 and Beatty could not show a reasonable probability of a different outcome at trial had his counsel
18 made the motion.²⁷

19 The Nevada Supreme Court had a reasonable basis for concluding that Beatty's trial
20 counsel satisfied *Strickland*. As the court pointed out, though Simms initially testified that he
21 could not remember if Beatty or his accomplices said anything during the encounter, the
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23 ²³ See Order of Affirmance, Ex. 83 at 2–3.

24 ²⁴ Testimony of Anthony Ardizzone, Reporter's Transcript, February 6, 2008, Ex. 36 at 78–79.

25 ²⁵ Testimony of Theodore Tube, Reporter's Transcript, February 6, 2008, Ex. 36 at 66–70.

26 ²⁶ ECF 13 at 10.

27 ²⁷ Order of Affirmance, Ex. 83 at 4.

1 prosecutor refreshed Simms's recollection with his previous statement to police that Beatty said
 2 "[g]ive us everything you got."²⁸ There was, thus, evidence supporting the attempted robbery
 3 charges. Beatty has not shown that his counsel was ineffective for failing to make the motion,
 4 and he has not shown that he was prejudiced because the motion would have failed.
 5 Accordingly, I decline to grant Beatty federal habeas relief on this basis.

6 **Ground 5. Simms's Identification of Beatty in Photo Lineup**

7 Beatty next claims that his trial counsel rendered ineffective assistance by failing to
 8 object to testimony that Simms previously identified Beatty in a photo lineup.²⁹ Beatty claims
 9 that because Simms stated only that Beatty's picture *looked like* the assailant, but did not
 10 positively identify him, this testimony was inaccurate. The Nevada Supreme Court rejected this
 11 argument. Reasoning that the strength of a previous identification goes to weight and not
 12 admissibility,³⁰ the court concluded that trial counsel was not deficient for failing to object to the
 13 previous identification testimony.³¹ The court also found that Beatty failed to show prejudice
 14 because his counsel elicited testimony that Simms did not, in fact, positively identify Beatty as
 15 the assailant during the lineup.³²

16 This ruling is reasonable and amply supported by the record. Simms made the following
 17 written statement at the photo lineup:

18 Number six looks a lot like the guy I think shot Paul but I'm not
 19 sure because I cant see his eyes to[o] good and there is more facial
 20 hair. I think if I could see him better in another picture were [sic]
 he is looking at the camera. The rubber band on his chin really

21 ²⁸ See Testimony of Corey Simms, Reporter's Transcript, February 5, 2008, Ex. 35 at 124–27.

22 ²⁹ ECF 13 at 12.

23 ³⁰ *Steese v. State*, 960 P.2d 321, 333 (Nev. 1998).

24 ³¹ Order of Affirmance, Ex. 83 at 3.

25 ³² *Id.* ("reasoning that, [w]hile trial counsel did not use this information to cross-examine the
 26 victim, trial counsel did ask the police officer who handled the photo line-up whether the victim
 27 positively identified appellant in the line-up. Therefore, this information was presented to the
 28 jury.").

sticks out because the guy with the gun had the same style chin hair with the rubber band around it.³³

Contrary to Beatty's characterization of the photo lineup, Simms's statement was far from equivocal. Though Simms did not positively identify Beatty as the assailant, he did pick Beatty's photo out of the lineup and indicated that he looked "a lot like the guy" who committed the murder. This claim also fails because Beatty has not shown prejudice; Simms also identified Beatty in trial as the shooter.³⁴ Thus, Beatty has not shown a reasonable probability that the outcome at trial would have been different even if his counsel had successfully impeached Simms's in-court identification with Simms's prior statement that he "looked a lot like the guy." Accordingly, Beatty is not entitled to federal habeas relief on this ground.

Ground 6. Statements at Sentencing

Beatty next claims that he received ineffective assistance of counsel on appeal because his appellate counsel failed to raise issues regarding allegedly false statements made at his sentencing hearing.³⁵ According to Beatty, these allegedly false statements were used to support probable cause for his arrest, so counsel should have also challenged his arrest. The Nevada Supreme Court found that the trial court properly struck the statement that Simms actually saw Beatty shoot Brown from the presentence investigation report because the testimony at trial was that Simms saw Beatty with the gun and heard a gunshot, but that he did not see Beatty shoot Brown. The court concluded that Beatty's appellate counsel was not ineffective under *Strickland* for failing to object to the statement's inclusion in the arrest warrant because Beatty did not show either that (1) the issuing judge would have declined to issue his arrest warrant without the stricken statement, or (2) that this claim, even if made, would have succeeded on appeal.

The Nevada Supreme Court's ruling on this claim is reasonable. As that court observed, the challenged statement—that Simms saw Beatty shoot Brown—was stricken from the PSR at

³³ Photo Lineup, Ex. 80F at 1121 (as in original).

³⁴ See Testimony of Corey Simms, Reporter's Transcript, February 5, 2008, Ex. 35 at 104–12.

³⁵ ECF 13 at 14.

1 sentencing.³⁶ Therefore, Beatty makes no showing that his appellate counsel could have raised
2 any viable issue as to the effect of that statement on his sentence. I also find that Beatty's claim
3 is without merit to the extent that he attempts to show that he was somehow prejudiced by that
4 statement in the issuance of the warrant for his arrest or during trial. The warrant affidavit
5 contained ample evidence to support a finding of probable cause for Beatty's arrest even absent
6 the challenged statement, and Beatty could not have been prejudiced by this statement at trial
7 because the jury never heard testimony that Simms saw Beatty shoot the gun. Beatty is not
8 entitled to habeas corpus relief on Ground 6.

9 **Ground 7. Cross-Examination of Simms**

10 In Ground 7, Beatty claims that his trial counsel was constitutionally deficient for failing
11 to use prior inconsistent statements to impeach Simms's testimony.³⁷ The Nevada Supreme
12 Court did not discuss this claim,³⁸ but the state court determined that this claim was belied by the
13 record "given that trial counsel extensively impeached [Simms] regarding all of his prior
14 inconsistent statements."³⁹

15 The state court's ruling is reasonable and well supported by the record. Beatty's trial
16 counsel extensively cross-examined Simms, and Beatty has not offered any prior inconsistent
17 statements of Simms that his trial counsel failed to use in that cross-examination. Beatty also has
18 not shown a reasonable probability that any further, or different, cross-examination of Simms
19 would have led to a different result at trial. Thus, Beatty is not entitled to habeas relief for his
20 counsel's alleged failure to adequately impeach Simms with prior inconsistent statements.

21 **Ground 8. Objections to Attempted-Murder and Murder Charges**

22 Beatty next claims that his trial counsel was ineffective for "failing to object to the
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24 ³⁶ See Reporter's Transcript of Sentencing, April 10, 2008, Ex. 50 at 6–12.

25 ³⁷ ECF 13 at 16.

26 ³⁸ See Order of Affirmance, Ex. 83.

27 ³⁹ Findings of Fact, Conclusions of Law, and Order, Ex. 82 at 4.

allegations of murder and attempted murder.”⁴⁰ Beatty contends that his counsel should have moved to dismiss these charges. He argues that there was no credible evidence to support them at trial because Simms made prior statements inconsistent with his trial testimony.⁴¹ The Nevada Supreme Court found that Beatty failed to demonstrate that there was a basis for trial counsel to object to these charges and concluded that trial counsel was not deficient for failing to raise frivolous objections.⁴² “Whether the victim made inconsistent statements or not goes to the weight of the evidence, not the admissibility,” therefore, the court reasoned, Beatty “failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel objected.”⁴³

This ruling is reasonable. Beatty’s claim that there was no reliable evidence produced at trial to support the murder or attempted-murder charges is belied by the record. Simms identified Beatty at trial as the person who shot Brown and then attempted to shoot Simms.⁴⁴ There is no showing that there was any basis for Beatty’s trial counsel to object to—or move to dismiss—the murder or attempted-murder charges. That Simms previously stated that Beatty’s photo looked like the shooter, but did not positively identify him as the assailant, does not completely discredit his trial testimony and in-court identification of Beatty.

Ground 9. Alibi Witness

Beatty claims that his trial counsel was ineffective for failing to give the state the required notice of intent to call a witness in support of an alibi.⁴⁵ The Nevada Supreme Court rejected this claim:

[Beatty] claimed that his sister-in-law would provide him with an alibi for the crimes. He gave trial counsel her name and number. When trial counsel

⁴⁰ ECF 13 at 18.

⁴¹ *See id.*

⁴² Order of Affirmance, Ex. 83 at 4–5 (citing *Donovan v. State*, 584 P.2d 708, 711 (Nev. 1978)).

⁴³ *Id.*

⁴⁴ *See* Testimony of Corey Simms, Reporter’s Transcript, February 5, 2008, Ex. 35 at 104–12.

⁴⁵ ECF 13 at 20.

1 attempted to contact her, counsel was informed that the sister-in-law was no
2 longer at that number. Further, even though she was noticed as a witness for the
3 State, appellant gave trial counsel an incorrect last name for his sister-in-law so
trial counsel was unaware that the person noticed by the State was appellant's
sister-in-law.

4 [Beatty's] sister-in-law had informed detectives that [Beatty] asked her to create a
5 fake receipt for the day of the crimes and this information would have been
presented to the jury to rebut [Beatty's] alibi.⁴⁶

6 The Nevada Supreme Court had a reasonable basis for concluding that Beatty's counsel
7 was not ineffective on this basis. Beatty has not shown that his counsel was deficient for failing
8 to give the state the required notice because he did not provide reliable contact information for
9 the witness, counsel made diligent efforts to find her, and there was reason to believe that the
10 proposed witness's testimony would have been more harmful than helpful to Beatty.
11 Additionally, Beatty makes no showing of what the witness's trial testimony would have been or
12 how the outcome of his trial would have been different had she testified on his behalf.
13 Accordingly, I decline to grant Beatty relief on this basis.

14 **Ground 10. Double Jeopardy**

15 Beatty also claims that he received ineffective assistance of counsel on his direct appeal
16 because his appellate counsel failed to adequately argue that he was subjected to double jeopardy
17 by application of Nevada's felony-murder rule.⁴⁷ The Nevada Supreme Court rejected this claim
18 in short shrift: because the Nevada Supreme Court has consistently rejected claims—like the one
19 Beatty sought to make—that Nevada's felony-murder rule violates the Double Jeopardy Clause,
20 Beatty could not show that his counsel was ineffective for failing to adequately make the
21 argument or that he was prejudiced by his counsel's failure to raise the issue in his opening
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24 ⁴⁶ Order of Affirmance, Ex. 83 at 5–6; *see also* Order of Affirmance, Ex. 61 at 6–7 (Nevada
25 Supreme Court ruling, on Beatty's direct appeal, that Beatty did not have good cause for his
26 failure to give notice of his alibi witness until the fourth day of trial, and commenting that "the
record reveals a strong possibility that the alibi was fabricated.").

27 ⁴⁷ ECF 13 at 22. Appellate counsel made a double-jeopardy argument in the reply brief, but not
28 in Beatty's opening brief.

1 brief.⁴⁸

2 The Nevada Supreme Court had a plainly reasonable basis for concluding that Beatty's
3 counsel complied with *Strickland* despite failing to raise this argument in Beatty's opening brief
4 (though he raised it in the reply), and Beatty has not shown that there is a reasonable probability
5 that the outcome of his appeal would have been different had counsel raised the double-jeopardy
6 issue in the opening brief. Indeed, in its order on Beatty's direct appeal, the Nevada Supreme
7 Court cited a line of cases rejecting felony-murder double-jeopardy arguments.⁴⁹ And, in its
8 order on the appeal in Beatty's state habeas action, the Nevada Supreme Court referred to its
9 citation of that case law when ruling that there was no showing of prejudice. Beatty is not
10 entitled to habeas relief on this claim.

11 **Ground 11. Sufficiency of Evidence to Support Conspiracy Conviction**

12 In Ground 11, Beatty claims that his trial counsel was ineffective for failing to argue that
13 there was insufficient evidence to support his conviction for conspiracy to commit robbery.⁵⁰
14 The Nevada Supreme Court wasted little time rejecting this argument, finding that there was
15 sufficient evidence at trial to convict Beatty of conspiracy because the evidence demonstrated
16 that he coordinated his actions with two other persons in an attempt to rob the victims.⁵¹

17 I agree with the Nevada Supreme Court that there was plainly sufficient evidence at trial
18 to support the conspiracy conviction. When viewed in the light most favorable to the
19 prosecution, the evidence strongly indicated that three individuals, including Beatty, acted in
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22 ⁴⁸ Order of Affirmance, Ex. 83 at 8; *see also* Order of Affirmance, Ex. 61, at 8, n. 3 (Nevada
23 Supreme Court's ruling on the double-jeopardy claim on Beatty's direct appeal).

24 ⁴⁹ *See* Order of Affirmance, Ex. 61 at 8, n. 3.

25 ⁵⁰ ECF 13 at 24.

26 ⁵¹ Order of Affirmance, Ex. 83 at 5 (citing *Thomas v. State*, 967 P.2d 1111, 1122 (Nev. 1998)).
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1 concert in an attempt to rob Simms and Brown.⁵² Beatty has not shown a reasonable probability
2 of a different outcome at trial had his trial counsel made a sufficiency-of-the-evidence challenge
3 to the conspiracy count. Therefore, Beatty is not entitled to habeas relief on this claim.

4 **Ground 12. Jury Instructions Regarding Attempted Murder**

5 Beatty claims that his trial counsel was ineffective for failing to propose a jury instruction
6 regarding attempted murder.⁵³ The Nevada Supreme Court declined to grant relief on this claim
7 because the record revealed that there were several instructions given at trial encompassing the
8 charge of attempted murder.⁵⁴

9 I agree with the Nevada Supreme Court that the trial record belies this claim. Jury
10 instruction number 24 explained the law regarding an attempt to commit a crime.⁵⁵ And Beatty
11 has not shown that any other jury instruction regarding attempted murder was necessary, or that
12 any other instruction would have presented a reasonable probability of a different outcome at
13 trial. Accordingly, Beatty is not entitled to relief on this claim.

14 **Ground 13. Jury Instruction on Reasonable Doubt**

15 Beatty next claims that his trial and appellate counsel were deficient for failing to object
16 to the jury instruction given by the trial court regarding reasonable doubt.⁵⁶ Beatty argues that the
17 reasonable-doubt instruction given by the trial court improperly shifted the burden of proof.⁵⁷
18 The Nevada Supreme Court rejected this claim, pointing out that the instruction given by the trial
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22 ⁵² See, e.g., Testimony of Corey Simms, Reporter's Transcript, February 5, 2008, Ex. 35, at 103–12.

23 ⁵³ ECF 13 at 26.

24 ⁵⁴ Order of Affirmance, Ex. 83 at 6.

25 ⁵⁵ See Jury Instructions, Ex. 39.

26 ⁵⁶ ECF 13 at 28.

27 ⁵⁷ *Id.*

1 court is the statutorily required instruction.⁵⁸

2 The jury instruction at issue is required by Nevada statute and has repeatedly been
3 approved by the Nevada Supreme Court.⁵⁹ Beatty points to no authority—either state or
4 federal—upon which any viable objection to the reasonable-doubt instruction could have been
5 grounded. Beatty is therefore not entitled to habeas relief on Ground 13.

6 **Ground 14. Confrontation of Detective Hardy**

7 In Ground 14, Beatty claims that his trial counsel was constitutionally ineffective for
8 failing to call Detective Scott Hardy as a witness so that he could be confronted and cross-
9 examined about statements made to him by Simms.⁶⁰

10 The Nevada Supreme Court did not discuss this claim in its order affirming the denial of
11 Beatty's state habeas petition.⁶¹ The state court, however, ruled that Beatty's trial counsel was
12 not ineffective for declining to cross-examine Detective Hardy about Simms's statements,
13 reasoning that any statements that Simms may have made to Detective Hardy were hearsay
14 without an applicable exception.⁶²

15 Beatty makes no showing of how Detective Hardy would have testified had he been
16 called as a witness, nor does he make any showing that there would have been a reasonable
17 probability of a different outcome at trial had Detective Hardy been called to testify. The state
18 district court's denial of this claim is reasonable and, thus, Beatty is not entitled to federal habeas
19 relief on this claim.

20 **Ground 15. Cumulative Error**

21 Finally, Beatty claims that he was deprived of effective assistance of counsel based on the

22 ⁵⁸ Order of Affirmance, Ex. 83 at 6 (citing NEV. REV. STAT. § 175.211; *Cutler v. State*, 566 P.2d
23 809, 813–814 (Nev. 1977)).

24 ⁵⁹ See NEV. REV. STAT. § 175.211; see e.g. *Cutler*, 566 P.2d at 813–14.

25 ⁶⁰ ECF 13 at 30.

26 ⁶¹ See Order of Affirmance, Ex. 83.

27 ⁶² Findings of Fact, Conclusions of Law, and Order, Ex. 82 at 5.

1 cumulative effect of errors made by his trial and appellate counsel.⁶³ Because I have identified
2 no error on the part of Beatty's trial or appellate counsel, this claim for relief—based on the
3 cumulative effect of these alleged errors—likewise fails.

4 **C. Motion for Evidentiary Hearing**

5 In his motion for evidentiary hearing, Beatty primarily focuses on Ground 1 of his
6 petition and requests an evidentiary hearing on the issues raised in that claim.⁶⁴ I dismissed
7 Ground 1 of Beatty's petition in a February 20, 2015, order under *Stone v. Powell*.⁶⁵ Thus, to the
8 extent Beatty seeks an evidentiary hearing for Ground 1, his motion is moot.

9 To the extent Beatty's motion may be construed to request an evidentiary hearing on any
10 other claim in his habeas petition, an evidentiary hearing is unwarranted. The Supreme Court has
11 instructed that review under 28 U.S.C. § 2254(d) is limited to the evidence before the state
12 court.⁶⁶ If the court determines, after review of the state-court record, that the state court's
13 "adjudication of a claim on the merits resulted in a decision contrary to or involving an
14 unreasonable application of clearly established federal law, or that the state court's decision was
15 based on an unreasonable determination of the facts," the court then conducts a *de novo* review
16 and "may consider evidence properly presented for the first time in federal court."⁶⁷ Because
17 Beatty has failed to show that the state court's adjudication of any of his claims resulted in a
18 decision contrary to federal law, or that the state court's decision was based on an unreasonable
19 determination of the facts in light of the evidence presented to it, Beatty is not entitled to an
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21 ⁶³ Petition for Writ of Habeas Corpus, ECF 13 at 32.

22 ⁶⁴ See Motion Requesting Evidentiary Hearing and Appointment of Counsel. ECF 54.

23 ⁶⁵ ECF 44.

24 ⁶⁶ *Cullen v. Pinholster*, 131 S.Ct. 1388, 1401–02 (2011).

25 ⁶⁷ *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir. 2014) (citing *Pinholster*, 131 S.Ct. at 1401); see
26 also *Murray v. Schriro*, 745 F.3d 984, 1000 (9th Cir. 2014) ("After *Pinholster*, a federal habeas
27 court may consider new evidence only on *de novo* review, subject to the limitations of §
28 2254(e)(2).").

1 evidentiary hearing to present new evidence to support his claims.

2 **D. Motion for Appointment of Counsel**

3 Finally, Beatty requests court-appointed counsel.⁶⁸ “Indigent state prisoners applying for
4 habeas corpus relief are not entitled to appointed counsel unless the circumstances of a particular
5 case indicate that appointed counsel is necessary to prevent due process violations,”⁶⁹ though a
6 court may appoint counsel at any stage of the proceedings “if the interests of justice so require.”⁷⁰
7 I do not find that the circumstances of this case show that appointment of counsel is necessary to
8 prevent due process violations or that the interests of justice require appointment of counsel to
9 pursue Beatty’s claims. I therefore deny his request.

10 **E. Certificate of Appealability**

11 Because I have rejected all of Beatty’s claims, I finally consider whether he should be
12 granted a certificate of appealability. The standard for issuance of a certificate of appealability
13 calls for a “substantial showing of the denial of a constitutional right.”⁷¹ When a district court
14 has rejected the constitutional claims on the merits, the petitioner must show that reasonable
15 jurists would find the district court’s assessment of the constitutional claims debatable or wrong.
16 When a district court denies a habeas petition on procedural grounds, the petitioner must show
17 that “jurists of reason would find it debatable whether the petition states a valid claim of the
18 denial of a constitutional right and that jurists of reason would find it debatable whether the
19 district court was correct in its procedural ruling.”⁷² Having considered all of Beatty’s
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21 ⁶⁸ ECF 55.

22 ⁶⁹ *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986) (citing *Kreiling v. Field*, 431 F.2d 638,
23 640 (9th Cir. 1970) (per curiam).

24 ⁷⁰ See 18 U.S.C. § 3006A; see also Rule 8(c), Rules Governing § 2254 Cases; *Chaney*, 801 F.2d
25 at 1196.

26 ⁷¹ 28 U.S.C. § 2253(c).

27 ⁷² *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074,
28 1077–79 (9th Cir. 2000).

claims—those denied on their merits in this order (Grounds 3–15), as well as those dismissed on procedural grounds on February 20, 2015 (Grounds 1 and 2)—under the appropriate standards, I decline to issue Beatty a certificate of appealability for any of his claims.

Conclusion

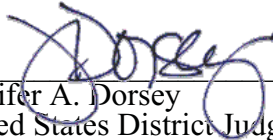
IT IS THEREFORE ORDERED that petitioner’s Petition for Writ of Habeas Corpus [ECF 13] is **DENIED** and petitioner is denied a certificate of appealability.

IT IS FURTHER ORDERED that petitioner’s Motion for Evidentiary Hearing [ECF 54] is **DENIED**.

IT IS FURTHER ORDERED that petitioner’s Motion for Appointment of Counsel [ECF 55] is **DENIED**.

The Clerk of Court is instructed to **ENTER JUDGMENT ACCORDINGLY** and to **CLOSE THIS CASE**.

Dated: January 5, 2016.



Jennifer A. Dorsey
United States District Judge